

law,¹ the State conceded that it did not properly establish the chain of custody and therefore the blood test results were inadmissible. The State therefore proceeded on an impairment theory. After reviewing the evidence, considering the credibility of the State's witnesses, and reviewing counsels' submissions, the Court finds Lopez **NOT GUILTY** of violating 21 *Del. C.* § 4177(a). The Court finds that the State did not meet its burden of proving beyond a reasonable doubt that Lopez was under the influence of alcohol and/or drugs while operating his motor vehicle.

FACTUAL AND PROCEDURAL HISTORY

Lopez filed a Motion to Suppress alleging that the Officer did not have reasonable articulable suspicion to stop Lopez's vehicle and that the Officer did not have probable cause to arrest Lopez. At the beginning of the suppression hearing, Lopez waived the argument of no reasonable articulable suspicion but continued with the argument that the Officer did not have probable cause.²

Suppression Hearing Facts

On December 17, 2018, at approximately 11:59 p.m., while conducting a proactive patrol, Corporal Petrella's attention was drawn to Lopez's vehicle due to the right headlight being out. Based on this observation he maintained sight of the vehicle and pulled Lopez over in the area of State Route 1 Northbound and Wolfe Neck Road in Rehoboth Beach. Lopez appropriately pulled over and stopped his vehicle. As Corporal Petrella approached Lopez's vehicle he smelled a strong odor of marijuana emanating from the vehicle. Corporal Petrella's initial observations of Lopez were: 1) he was slow and sluggish in his movement and speech, 2) he had bloodshot, glassy eyes, 3) his pupils were dilated, and 4) he was polite. Corporal Petrella inquired about the odor of

¹ *Martin v. State*, 60 A.3d 1100 (Del.2013).

² The parties stipulated that the testimony derived through the suppression hearing would be used for trial purposes as long as it was admissible for trial.

marijuana that was coming from the vehicle and Lopez responded that he smoked marijuana in his car with friends between the times of 7:30 p.m. and 8 p.m. while attending a Christmas Party. Lopez also admitted to drinking an orange crush, an alcoholic beverage, at the party. Corporal Petrella then asked Lopez to perform field sobriety tests which Lopez agreed to do.³

Lopez was first instructed to perform the Alphabet test and was asked to say the alphabet from E to P. Lopez reasonably performed this task but left out the letter E. The next test was the Number test with the instruction to count backwards from 59 to 42. Lopez sequentially counted backwards but he left out numbers 59 and 42. Before Corporal Petrella moved onto the physical tests, Lopez informed him that he had issues with his knees from a prior surgery but thought that he could still perform the tests. On the Walk-and-Turn Test Corporal Petrella observed that Lopez raised his arms during some of the steps, stepped off line slightly, and did not turn in the proper direction. He did however walk the correct amount of steps. On the One Leg Stand test Lopez lost his balance several times and did not fully complete the test. The State attempted to introduce evidence regarding the Horizontal Gaze Nystagmus (HGN) test, the Vertical Gaze Nystagmus (VGN) test, the Lack of Convergence test, and the Modified Rhomberg Balance test but was unable to do so.⁴ Lastly Lopez was asked to blow into a PBT. The Officer did not testify whether the result was a pass or fail.

Based on Lopez's physical appearance, Lopez's performance on the field tests, and his admission to smoking marijuana four hours earlier that evening, Corporal Petrella believed he was under the influence of a drug while operating a motor vehicle. Corporal Petrella mirandized Lopez

³ Corporal Petrella's motor vehicle recording (MVR) was activated throughout the entire traffic stop. However, upon review of the video, which the State introduced into evidence, it appears that the microphone was not synched to his vehicle so the video does not have sound.

⁴ The Court sustained Lopez's objections to the admissibility of the HGN test and other Scientific Recognition Testing because the State did not provide Corporal Petrella's certifications in its discovery answer and the State was unsuccessful in laying the proper foundation.

when they arrived at Troop 7. Lopez told Corporal Petrella that he was willing to answer any further questions and reiterated that he smoked marijuana in his car with friends four hours earlier that evening and that he drank one orange crush at the Christmas party. Corporal Petrella then completed a blood search warrant which was approved. A phlebotomist from Seascope Health Alliance LLC, responded to Troop 7 to conduct a blood draw.⁵

The State called its second witness, Jessica Smith, the Chief Forensics Toxicologist Laboratory Manager at the Division of Forensic Science for the state of Delaware. As previously stated, the State conceded that this evidence was inadmissible due to chain of custody issues.

DISCUSSION

Motion to Suppress

On a Motion to Suppress, the State bears the burden of proving by a preponderance of the evidence that “the challenged search or seizure comported with the rights guaranteed Defendant by the United States Constitution, the Delaware Constitution, and Delaware statutory law.” *State v. Anderson*, 2010 WL 4056130 at *3 (Del. Super. Oct. 14, 2010). After waiving his reasonable articulable suspicion argument, the sole argument Lopez raised in support of his Motion to Suppress was that Corporal Petrella did not have probable cause to arrest him for violating 21 *Del. C.* § 4177(a).

In *State v. Maxwell*, the Delaware Supreme Court echoed the Federal Supreme Court’s standard of establishing probable cause which is “only the probability, and not a prima facie showing of criminal activity.” *State v. Maxwell*, 624 A.2d 926, 928 (Del. 1993) (quoting *Illinois v. Gates*, 462 U.S. 213, 235, 103 S.Ct. 2317, 2330 (1983) (quoting *Spinelli v. United States*, 393

⁵ Lopez objected to Corporal Petrella testifying that Ms. Grose is a phlebotomist. On cross-examination Corporal Petrella testified that when Ms. Grose arrived at Troop 7 she did not show him certification and/or proof that she is actually a phlebotomist.

U.S. 410, 419, 89 S.Ct. 584, 590 (1969))). Probable cause does not have a precise definition; it falls somewhere on the spectrum of suspicion and sufficient evidence to convict.⁶ It is well established in Delaware that probable cause is measured “by the totality of the circumstances through a case by case review of ‘the factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians act.’” *State v. Maxwell*, 624 A.2d at 928 (quoting *Illinois v. Gates*, 462 U.S. at 231, 103 S.Ct. at 2328 (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310 (1949))).

Whether a Police Officer has probable cause to arrest a driver for a DUI offense is usually determined by the Officer’s observations of impaired driving, the defendant’s physical appearance, the defendant’s performance on the field sobriety tests, and the defendant’s overall demeanor.⁷ However, the Delaware Supreme Court has explained that “mixed results in field sobriety tests do not extinguish probable cause if other facts are present.” *Lefebvre v. State*, 19 A.3d 287, 294 (Del. 2011) (quoting *Perrera v. State*, 2004 WL 1535815 at *1 (Del. June 25, 2004)). Thus, Corporal Petrella must have possessed a “quantum of trustworthy factual information” sufficient to warrant an Officer of reasonable caution to believe that Lopez was under the influence of a drug at the time he was pulled over. 19 A.3d at 294.

In the present case, the State presented the following evidence: 1) Corporal Petrella smelled a strong odor of marijuana emanating from Lopez’s vehicle, 2) Lopez admitted to smoking marijuana with friends four hours earlier that evening, 2) Lopez admitted to drinking an orange crush earlier that evening, 3) Corporal Petrella observed that Lopez’s speech and body movements were slow and sluggish, 4) Corporal Petrella observed that Lopez had bloodshot, glassy eyes, 5) Lopez did not perform the One-Leg Stand test correctly, and 6) Lopez adequately performed the

⁶ *Thompson v. State*, 539 A.2d 1052, 1055 (Del. 1988).

⁷ *Lefebvre v. State*, 19 A.3d 287, 294 (Del. 2011).

Alphabet test, Number test, and Walk-and-Turn test with minor mistakes.⁸ Considering the evidence listed above, the Court finds that the State has met its burden in proving by the preponderance of the evidence that Corporal Petrella had probable cause to arrest Lopez for violating 21 Del. C. § 4177(a).

For the foregoing reasons Lopez's Motion to Suppress is **DENIED**.

DUI Trial

In order for a defendant to be found guilty under 21 Del. C. § 4177(a), the State must meet its burden in proving beyond a reasonable doubt that the defendant was driving under the influence of alcohol and/or drugs. "Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in a case. Proof beyond a reasonable doubt does not mean that the guilt of the accused must be established to an absolute certainty. Reasonable doubt does not mean a vague, speculative doubt, nor a mere possible doubt; it is such a doubt as intelligent, reasonable and impartial people may honestly entertain after a careful and conscientious consideration of the evidence in the case." *Mills v. State*, 732 A.2d 845, 852 (Del. 1999).

21 Del. C. § 4177(a) states that, "no person shall drive a vehicle... when the person is under the influence of alcohol... or under the influence of any drug." [Under the influence] is defined to mean that "the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle."⁹

⁸ Lopez argued that his mistakes were not due to being under the influence of marijuana but rather due to the fact that he is severely overweight. On cross-examination when Corporal Petrella was asked if his DUI training advised him that certain physical things could cause false results on the field tests, he responded that if someone is injured it could inhibit one's ability to perform. When asked if his DUI training advised him that someone's age or weight could cause false results on the field tests, he responded that in theory if someone is of a certain age or overweight it could inhibit their ability to take the field tests but it depends on the person.

⁹ 21 Del. C. § 4177(c)(11)

Through Corporal Petrella's testimony the record shows that there was a strong odor of marijuana emanating from Lopez's vehicle, Lopez admitted he smoked marijuana four hours earlier that evening, he had bloodshot, glassy eyes, his body movements and speech were slow and sluggish, and that he did not perform well on the One Leg Stand test and observed minor issues with the other tests.

In *State v. Shutak*, the Defendant was found guilty of driving under the influence of marijuana.¹⁰ Shutak, while operating a motor vehicle made an illegal U-turn which resulted in a collision with another car.¹¹ During that investigation Shutak admitted to smoking marijuana 30 minutes prior to the accident and admitted that he felt like he was under the influence of marijuana.¹² Shutak performed poorly on the field sobriety tests and a Drug Recognition Expert (DRE) testified that after his evaluation of Shutak he believed him to be impaired.¹³

This case is distinguishable from *Shutak*. First and perhaps foremost, there was no suspicious or erratic driving observed. Lopez was stopped for an equipment violation because a headlight was out. While there was an admission to smoking marijuana four hours earlier, there was no admission that he felt like he was under the influence. While Lopez's performance on the field sobriety test were not perfect, most of the problems alluded to by the Officer (there was no audio) were minor on the Number test, Alphabet test, and Walk-and-Turn test. The Court could see on the MVR that Lopez did not perform well on the One Leg Stand test, however, the Court takes into account Lopez's statement to the Officer that he had issues with his knee prior to performing the test. Lopez is a very large person. The Officer testified on cross examination that an injury, age, and weight could inhibit a person's ability to perform the tests accurately. In this

¹⁰ *State v. Shutak*, 2017 WL 4339690 (Del. Com. Pl. Sept 29, 2017).

¹¹ *Id.* at *2.

¹² *Id.*

¹³ *Id.* at *3.

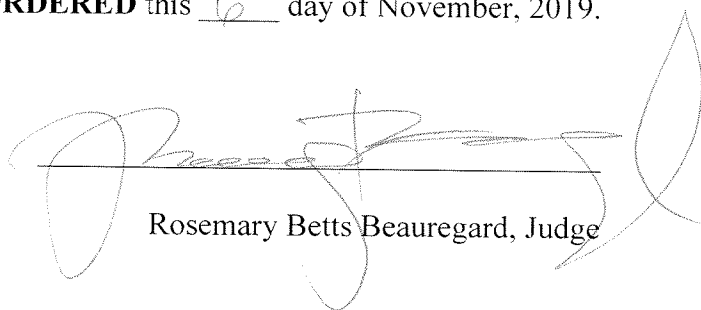
case there were no scientific tests. The State was not able to submit into evidence the blood results or the HGN results due to its inability to lay a proper foundation. Here, there is no DRE testimony as there was in *Shutak*.

Notwithstanding the evidence presented by the State and considering the credibility of the State's witnesses, the Court finds that the State has not met its burden of proving beyond a reasonable doubt that Lopez was driving under the influence of alcohol and/or drugs, in violation of 21 Del. C. § 4177(a).

CONCLUSION

For the foregoing reasons, this Court finds the Defendant, Jaso R. Lopez, **NOT GUILTY** of violating 21 Del. C. § 4177(a).

IT IS SO ORDERED this 6th day of November, 2019.



Rosemary Betts Beauregard, Judge